

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5879 of 1986

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

MAHENDRAKUMAR C BHATT

Versus

RANGSAGAR COOPERATIVE HOUSING SOCIETY LTD.

Appearance:

MR BR PARIKH for Petitioner

None present for Respondent No. 1

MR ASHOK K PADIA for Respondent No. 2

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 09/12/96

ORAL JUDGEMENT

1. Heard learned counsel for the parties. The brief facts of the case are that the petitioner is a member of the respondent no.1 Cooperative Housing Society since 1971. The society did not allot housing flat to the petitioner, and as such, he filed lavad case no.437/82 before the Board of Nominees, Ahmedabad. The prayer has been made by the petitioner in the lavad suit that the

respondent-society be directed to allot to the petitioner one housing flat from the flats of the respondent-society. The prayer for interim relief has also been made by the petitioner in the suit and the Board of Nominees had granted temporary injunction pending hearing and final disposal of the lavad suit restraining the respondent-society from allotting the flats of part no.III of the respondent-society except after reserving one flat no.25 I for the petitioner and further the society has been restrained from discontinuing the membership of the petitioner.

2. In the suit an application has been filed by the respondent no.1-society giving out thereunder that it has been bifurcated in three parts. Amongst them two parts of the said society are known as Rangсар Cooperative Housing Society Ltd. and third part is known as Shital Cooperative Housing Society Ltd., and Shital Cooperative Housing Society is a necessary party to the suit. On this application of the respondent no.1, the petitioner has filed an application Ex.32 on 26th November, 1984 before the Board of Nominees, Ahmedabad and prayed for joining the Shital Cooperative Housing Society as a party to the suit. A copy of this application along with order made thereon has been filed by the petitioner. On 26th November, 1984 on this application the order has been made "Summons be issued to the opponent, taking process fee". Then on 12th April, 1985, the Board of Nominees made an order on this application which reads as under:

Join as a defendant as a necessary party
and copy of the plaint be given. Process be paid.
Summons be issued by registered post.

On 8th October, 1985, the Board of Nominees dismissed the suit under the provisions of Order 9 Rule 3 C.P.C.. That order reads as under:

The plaintiff is not present when called
out. He has not carried out the order as per
Ex.32 dated 12-09-1985, though several dates
granted. The suit therefore dismissed for want of
prosecution under O.9 R.3 C.P.C..

There is no dispute between the parties that the date mentioned 12-09-1985 in the order dated 8-10-1985 is 12-04-1985. From the order dated 8-10-1985, it is clear that the suit has been dismissed under provisions of Order 9 Rule 3 C.P.C. for noncompliance of the order dated 12-04-1985. On 12-04-1985, the Board of Nominees has ordered for joining of the society as party and for filing of the plaint and process fees.

3. The petitioner has taken up the order of the Board of Nominees by filing an appeal before the Gujarat State Cooperative Tribunal which came to be dismissed under the order dated 15th October, 1986. The appellate authority has held that there was no sufficient cause for the absence of the petitioner and as such, the suit has rightly been dismissed under O.9 R.3 C.P.C..

4. The petitioner filed an affidavit of Shri Jitendra Patel, advocate, who was the counsel for the petitioner before the Board of Nominees. In the affidavit, Shri Jitendra Patel made a statement that he filed the process fees of Rs.4/- for service of the summons on the newly added party and he also supplied the copy of the plaint. The averments made by Shri Patel, advocate in the affidavit have not been controverted by the respondent. The counsel has stated that though he supplied the necessary process fees as well as the copy of the plaint, but from the office of the Board of Nominees, the summons were not issued to the newly added party. From the order of the Board of Nominees, it is borne out that the suit has been dismissed on the ground that the order dated 12th April, 1985 was not carried out. The Board of Nominees though made a reference to the O.9 R.3 C.P.C. in the order, but it is also there in the order that the petitioner has not deposited the process fees and also not filed the plaint for newly added party. If we read the order of the Board of Nominees as a whole then it comes out that the suit has been dismissed under O.9 R.2 C.P.C.. Rule 2 of Order 9 reads as under:

R.2 of O.9 of C.P.C:- where on the day so fixed it is found that the summons has not been served upon the defendant in consequence of the failure of the plaintiff to pay court-fee or postal charges (if any) chargeable for such service [or to present copies of the plaint or concise statements, as required by R.9 of O.7,] the court may make an order that the suit be dismissed.

The dismissal of the suit in the present case was for the reason that the petitioner has failed to pay the court fees and failed to submit the copy of the plaint to be sent to the newly added respondent. So the mentioning of provisions of O.9 R.3 in the order of the Board of Nominees is apparently a mistake. Otherwise also, the day on which the suit has been dismissed it was at the stage of serving of the notice to the newly added party, and as such, the provisions of O.9 R.3 C.P.C. may not be

attractive. The failure to deposit the court fees and nonfiling of the copy of the plaint was the cause for the dismissal of the suit though on the said day the plaintiff or his counsel were also not present. The substance of the matter is to be considered and not the form. The appellate authority has given more emphasis on the absence of the counsel and it has not gone on the question whether the plaintiff has complied with the order of the court below dated 12th April, 1985 or not. An objection has been raised from the side of the respondent before the appellate authority also that the proper course for the petitioner was to approach the Board of Nominees under O.9 R.4 C.P.C. for restoration of the suit and not to file an appeal. Though the appellate authority has not given any finding on this issue, but it has proceeded that the plaintiff has failed to give out any justification or sufficient cause for the absence and decided the appeal. It is true that the order of Board of Nominees would have been made appealable under the Gujarat Cooperative Societies Act, but at the same time it is equally true that the petitioner has an opportunity to approach to the Board of Nominees under O.9. R.4 C.P.C. for restoration of the suit. Even if the suit is dismissed under O.9 R.3 C.P.C., an application under O.9 R.4 C.P.C. was maintainable.

5. The petitioner's counsel has filed an affidavit which is uncontroverted and that needs the consideration by the Board of Nominees. In case the petitioner has deposited the process fees and filed a copy of plaint then certainly the order of the dismissal of the suit on the ground given by the Board of Nominees may not be correct. Otherwise also, ample powers are there with the Board of Nominees to given an opportunity to the petitioner to deposit the process fees and file the copy of plaint, if it is not filed. This aspect has not been gone into may be for the reason that the petitioner has not raised this issue before the appellate authority. Where the petitioner has been provided the remedy under O.9 R.4 C.P.C. against the order of the Board of Nominees, the proper course would have been for the appellate authority to sent him back, first to make out his case before the Board of Nominees. It is not in dispute that the order passed by the Board of Nominees under O.9 R.4 C.P.C. would have been appealable.

6. Taking into consideration the totality of the facts of this case, the order of the appellate authority is quashed and set aside and the petitioner is given an opportunity to move an application before the Board of

Nominees under O.9 R.4 C.P.C. for restoration of the suit which has been dismissed for noncompliance of the order dated 12th April, 1985. The petitioner, if so desire, may file an application within a period of one month from the date of receipt of certified copy of this order. In case, the application is not filed within the stipulated period aforesaid then this Special Civil Application shall stand dismissed, rule shall stand discharged and interim relief, if any, granted by this court shall stand vacated. In case, the application is filed by the petitioner it shall be decided by the Board of Nominees on merits in accordance with law. Rule is made absolute in the aforesaid terms with no order as to costs.
